90-839

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF KERN,

Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE McKENZIE, BOB TEMPLE, BARRY SCHULTZ, JIM CHAPMAN, BOB TURNER, and STEVE McLEMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

B. C. BARMANN,
County Counsel
ROBERT D. WOODS
Chief Deputy - Litigation and
Counsel of Record

Administration and Courts Building
1415 Truxtun Avenue, Fifth Floor
Bakersfield, California 93301
(805) 861-2326

Attorneys for Petitioner

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Do principles of federalism under the Tenth Amendment permit a judicial reading of the Fair Labor Standards Act which imposes massive back pay liability and future costs, in the absence of a clear indication Congress intended such a result?

2. Should *Garcia v. San Antonio Metropolitan Transit Authority* be overruled?

PARTIES TO THE PROCEEDING

All parties are listed in the caption to this Petition.

TABLE OF CONTENTS

Page

Page

LIST OF APPENDICES

TABLE OF AUTHORITIES

Page

Cases

Page

Constitution

Regulations

Federal Statutes

Page

State Statutes

Advisory Opinion

Legislative Material

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

COUNTY OF KERN,
Petitioner,

vs.

DAN ABSHIRE, DENNIS CARROLL,
LARRY FRANK, BILL RICKMAN,
TOM BLACKMON, RICHARD PELLERIN,
BILLIE McKENZIE, BOB TEMPLE,
BARRY SCHULTZ, JIM CHAPMAN,
BOB TURNER, and STEVE McLEMORE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This matter involves the continued existence of civil service as it has evolved in the several states and local entities, and presents a potential for bankrupting many local public entities. Therefore Petitioner, COUNTY OF KERN (herein "Kern County"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered July 11, 1990. Petitioner requests that, if a writ is not granted, summary reversal be granted. At a minimum,

this matter warrants a grant of the writ, vacation of the Opinion below, and a remand.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 908 F.2d 483 (9th Cir. 1990) and is printed in Appendix A, attached hereto. The Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of California, No. CV-F-86-533 MDC (May 31, 1988) and the Judgment of the District Court, No. CV-F-86-533 MDC (July 18, 1988) are unreported and are attached hereto in Appendix C.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A) was entered on July 11, 1990. A timely petition for rehearing was denied on August 31, 1990 (Appendix B). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. The Tenth Amendment of the United States Constitution provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people."

2. 29 U.S.C. § 207.
3. 29 U.S.C. § 213.
4. 29 C.F.R. § 541.1
5. 29 C.F.R. §§ 541.101 - 541.119.

STATEMENT OF THE CASE

This case involves the availability of the "bona fide executive" exemption from Fair Labor Standards Act coverage to public employers in the civil service environment. Under the Ninth Circuit's application of the "Salary Test" to public employment, it appears that no civil service employee in Kern County or most other public entities would be exempt. Kern County's fiscal exposure to date for potential back overtime pay to the 28 Battalion Chiefs is in the hundreds of thousands of dollars. Extending the principle to those classed as executives by the County, which has a total work force of about 7,000 people, would likely bankrupt the County. Extending the Ninth Circuit's holding to other municipalities, counties and states would cripple civil service.

This case originated as a suit brought by Fire Captains and Battalion Chiefs employed by the Kern County Fire Department (hereafter referred to as "KCFD"). The suit alleged that Petitioner, Kern County, failed to pay overtime (at time and one-half) to the Respondents as required by the overtime provisions of the Fair Labor Standards Act (hereafter referred to as "FLSA"), 29 U.S.C. §§ 201, *et seq*.

The County asserted that Fire Battalion Chiefs were exempt from the overtime provisions of the FLSA, as

they were, and are, bona fide executive employees. After review of Fire Captains' actual functions, the County concluded that Fire Captains as a classification were not exempt, in that not all captains regularly and routinely supervise two or more subordinate personnel, and the case proceeded to trial as to Battalion Chiefs.

To fit within the FLSA's "executive or administrative" exemption, employees must (1) perform administrative and managerial tasks 80% of the time, and (2) be paid on a salary basis in the amount of $250.00 per week or more. Respondents conceded readily their pay substantially exceeds $250.00 per week. The trial court also concluded the duties of Battalion Chiefs were primarily administrative and managerial, and that finding was not reached or disturbed by the appellate court.

Each Battalion consists of several fire stations, and battalion sizes range up to 3,000 square miles. A few Battalion Chiefs are assigned to special units and work a 40-hour week, still performing supervisory and administrative tasks. Structurally, there is a Fire Chief, four Deputy Chiefs, 28 Battalion Chiefs and 481 subordinate personnel. These facts clearly demonstrate the managerial function of Battalion Chiefs. As of July 1, 1989, the base pay of Battalion Chiefs as established by County Ordinance ranged from $40,536.00 to $49,476.00 plus fringe benefits.

ARGUMENT

I.

In the Absence of Clear Congressional Intent, Public Employers Should Not be Subjected to Intrusive Policy Changes, Monetary Burdens and Retroactive Liability

The court below gave no consideration to the impact of its ruling on the functioning of our federal system. Its lack of attention to federalism as required by the Tenth Amendment is remarkable in light of this Court's long struggle to reconcile principles of federalism with the FLSA's often extraordinary intrusions into state and local function and decision making. After first upholding application of the Act to some classes of state and local employees (*Maryland v. Wirtz* (1968) 392 U.S. 183), then eight years later striking it down as a Tenth Amendment violation (*National League of Cities v. Usery* (1976) 426 U.S. 833), the Court has most recently permitted the application of FLSA to state and local governments (*Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528).

In reaching this result the *Garcia* Court relied heavily on certain political safeguards to protect federalism. Indeed *Garcia* rests on the premise that Congress, and particularly the Senate, will protect the States' interests against excessive federal governmental intrusion. The Court in *Garcia*, however, identified few political safeguards against Executive intrusions on the states — and none at all against judicial excursions into state and local governments. *Garcia's* rationale therefore requires courts to be extremely reluctant to impose heavy new

burdens on local entities, especially where there is no evidence Congress intended such a result.

Following *Garcia* the legislature quickly acted, in light of the Department of Labor's intention to commence enforcement of the FLSA by November 1, 1985. The 1985 amendments to FLSA were signed by the President November 13, 1985, to forestall imposition of FLSA on state and local governments. *See, Weekly Compilation of Presidential Documents*, November 18, 1985; Vol. 21, No. 46, pp. 1390-1391. A number of bills were introduced that year, ultimately yielding a compromise bill designed to preserve a decent minimum for rank and file workers by a modified and limited application of FLSA to local government employees.

Prior bills, such as S1434 (Wilson) sought to legislatively override *Garcia*. A consensus could not be reached as to complete exemption of local governments from FLSA, hence compromise bills emerged, S1570 and HR3530. After Joint Conference the measure passed, as Public Law 99-150. Significantly, the title given to the enactment specified its purpose as allowing local governments to provide compensatory time off in lieu of monetary payments for overtime, clarifying that volunteer and special assignment hours need not be counted towards overtime, and similar measures intended to reduce the fiscal burden on local governments and provide flexibility in personnel scheduling and management — quite the opposite of what the court below has done.

P.L. 99-150 did not address the "bona fide executive" exemption from FLSA coverage as it relates to public employment. The intent of allowing only a limited application of FLSA to local governments (rather than completely exempting them) clearly appears from the legislative history. Report 99-159, 99th Congress, First

Session (October 17, 1985), page 7, states the need for the Bill (S1570) as follows:

> "In seeking to guarantee a *minimum standard of living for all working Americans*, the FLSA has been heralded as one of our most fundamental efforts to direct economic forces into socially desirable channels. By 1975, FLSA coverage extended to three-fourths of the nation's employed *nonsupervisory* labor force; federal, state and local government employees were the only major exceptions." (Emphasis added.)

The Report acknowledged the special needs of public employment and the role of the states in our federal system. At page 7 of the report, concern was expressed to not "undermine" the position of the states or "unduly burden" them, the Committee seeking to ". . . further the principles of cooperative federalism." Continuing at page 8, the Report cites *Garcia* and the problems which arise under the decision for the states, and seeks to avoid them.

The debates in Congress evinced this purpose, and showed that many senators and representatives continued to question whether FLSA should be applied to the states at all. *See, e.g.*, Congressional Record, S14046-14057, 14095ff, (October 24, 1985); H9236-9243 (October 28, 1985). The consistent message of Congress was that the Act should be applied to assure that *nonsupervisory* state and local government employees would have the same "decent minimum" as the rest of industry, specifically being subject to the minimum wage protection, and entitled to compensation for overtime — but in the form of time off or money, at the local government's option.

The importance of collective bargaining agreements was also affirmed in the Congressional debates, and care taken not to cripple either existing agreements, or to narrow the scope of negotiable items for the future.

In enacting the FLSA initially, and throughout the many subsequent amendments, Congress did not adopt the harsh and unnecessary rule announced by the Court below. To the contrary, Congress very simply exempted "executive and administrative" employees, leaving elaboration of this exemption to the good sense of the courts and Department of Labor.

The lower Court's application of the FLSA does not emanate from Congress, or from the Executive Branch either. The Labor Department's rather sweeping "subject to deduction" test was written originally for private employers, and has not been reconsidered directly since the most recent application of the FLSA to local governments. Thus, no political safeguards could have, or in fact have functioned to protect the values of federalism in applying this test to public employers.

In an effort to ameliorate the problem created, the Department issued a Letter Ruling dated January 9, 1987, which announced the "Salary Test" would not be enforced against public employers where a ". . . state or local law . . ." which prohibits payments for absences which are not covered by accrued leave time was in place prior to April 15, 1985. Kern County cited the State Constitution and its local Ordinance Code section which so required. The Court below dismissed the State Constitutional provision as inapplicable, and never addressed the local ordinance. Thus, even had some "political safeguard" been operative, the Court below has ridden roughshod over it.

The regulations as promulgated by the Labor Department do not, for public or private employers, impose back pay liability for every hourly deduction from pay. Section 541.118(a)(6) provides that an otherwise exempt administrative employee is not transmuted to covered hourly status by virtue of an occasional deduction. Instead, the worker is treated as hourly for the pay period in which the deduction occurred. Only if such deductions are "regular and recurring" would the Department, potentially, conclude the exemption is unfounded. *Id.* This section clearly is intended to give wide latitude to avoid harsh results, even as to private employers. The logic applies with even greater force and constitutional dimension in the public sector.

It therefore appears nothing in the Act or subsidiary regulations requires Kern County Battalion Chiefs be treated as covered. At most, Battalion Chiefs should be treated as covered only for pay periods in which a deduction occurs. So far as the record shows, no Kern County Battalion Chief has actually suffered a deduction. From the standpoints of common sense and public policy therefore, it appears Kern County has established, in its Civil Service System, executive pay and accrual of time off which effectively prevents docking of pay for occasional absences, while preserving solid accountability for the expenditure of tax dollars in salaries. Principles of federalism require those virtues be respected.

For *Garcia*'s view of federalism to survive, the courts must at a very minimum give political safeguards a chance to work. Given the expressed views of Congress in enacting P.L. 99-150 as a compromise measure, the courts should be extremely reluctant to impose liabilities on local governments. This is especially true, where Congress has not clearly intended to impose new

liabilities on the States. *Employees of the Dept. of Pubic Health & Welfare, State of Missouri, et al. v. Dept. of Public Health & Welfare, State of Missouri* (1973) 411 U.S. 279, 284-285. In this case the Supreme Court noted the exceptional caution necessary, when dealing with matters that will affect a broad class of public employees.

The Court below displayed only eagerness to impose new and unwarranted liabilities and policies on public employment. It first declared that ". . . exemptions to FLSA are to be narrowly construed," citing private employment cases. (908 F.2d 485.) On a similar grounding, it then stated counties, lik private employers, "not only have the burden of proof . . . but they must show that the employees fit 'plainly and unmistakenly within [the exemption's] terms.' " (*Id.*, at p. 486.)

In its rush to change the face of public employment and impose retroactive liability, the lower court swept aside — indeed ignored — the impact of its ruling on our federal system. It ignored the absence of Congressional intent (in fact the contrary intent) to impose harsh penalties and restrictive changes on state and local governments. It further ignored the Executive's efforts to avoid imposition of such disabilities. This willful refusal to consider the unique nature and concerns of state and local public employers, as recognized by Congress, runs directly counter to the principles of federalism inherent in the American system of government.

II.

The Lower Court's Ruling Imposes a Substantial Penalty on a Widespread, Reasonable and Necessary Policy of Public Employers

The decision below not only violates federalism; it also runs counter to common sense. Public employers deserve greater leeway in complying with the FLSA, not only because of their constitutional status but also because, as governments, they are subject to constraints not found in the private sector — what may be termed political safeguards for public employees. Public employees are employees, and also constituents. The services they provide are vital and in many cases not available elsewhere, making it a matter of immediate public concern if their compensation and working conditions lead to labor unrest. The absence of a profit motive in the public sector also makes it highly unlikely government employers will endeavor to squeeze every nickel from their employees.

Concurrently, the high visibility of public entities brings special responsibilities. In the absence of profit-and-loss statements, entities and their employees are more often measured by their effort than their output.

Civil service systems have therefore typically evolved a pattern of tightly regulated working hours, in an effort to assure the public it is getting full value for every tax dollar. A part of this process, an integral part of civil service compensation, is accumulation of time off in the form of vacation, sick leave and, in Kern County's case (as with many other entities), compensatory time off for hours in excess of a stated maximum. Conversely, public accountability requires public employees (executive

and labor alike) not waste public funds by failing to work required hours.

This premise is so basic to local autonomous operations that the California Constitution has multiple sections requiring public expenditures be strictly accounted for, including compensation of public employees. The California Constitution, article XI, section 1, subdivision (b) requires the governing bodies of counties to provide for the number, tenure, compensation and appointment of employees. Article IV, section 17 specifically forbids retroactively compensating a contractor, public employee or official. Article XVI, section 16 forbids making a gift of public funds.

Affirming the importance of accountability for expenditures of public funds, the California Attorney General issued an opinion indicating it would be a violation of the State Constitution to increase the pay of a county employee retroactively to the date salary discussions between the public employee and public employer commenced. *See* 65 Ops.Cal.Atty.Gen. 66 (1982). Similarly, a California Appellate Court has ruled it would be unconstitutional to reimburse a school custodian the amount of pay he would have earned during the time between his suspension and dismissal, and his reinstatement to employment. The custodian had been suspended after child molestation charges were brought and a guilty verdict obtained. He was reinstated upon acquittal of the charges at a new trial granted in the case. *Hutton v. Pasadena City Schools* (1968) 261 Cal.App.2d 586, 68 Cal.Rptr. 103.

Against the background of the State Constitution's emphasis on the importance of setting public employees' compensation and accountability for public expenditures, two other considerations emerge. First, it should be noted the Respondents (like many, if not most public

employees) are covered by a collective bargaining agreement. This agreement (and applicable state law, *e.g.*, the Meyers-Milias-Brown Act, Ca. Government Code §§ 3500, *et seq.*) require that, before matters of wages, hours and working conditions may be changed, the public entity and bargaining unit must meet and confer. The Ninth Circuit's ruling abrogates the collective bargaining agreement by in essence granting a retroactive pay award (for past overtime at time and one-half) without altering or reducing other compensation, specifically including management benefits not afforded to hourly employees who in fact are by contract to receive time and one-half pay for overtime. The Respondents have thus been granted a windfall never contemplated in the collective bargaining agreement. A similar result likely awaits other local public entities.

In short, the decision below places a massive liability on public employers who have developed and adopted a reasonable policy to meet the twin concerns of fairness to their employees and accountability to their constituents in the unique circumstances of government service. Whatever ends such harsh penalties may serve in private industry, they have no place in intergovernmental relations. Although Congress could, after *Garcia*, treat local governments that way, it did not do so. The clear import of the 1985 legislation (P.L. 99-150) and the discussions and compromises leading to the final version is that local governments, in the view of Congress, should have wide latitude in the area of wages and hours, being subject only to a "decent minimum" standard at the lower end of the wage spectrum. The courts should respect this expressed viewpoint.

ADDITIONAL REASONS FOR GRANTING THE WRIT

I.

The Decision Below is in Conflict with the Decisions of Other Courts

This issue has sparked division throughout the federal court system. Some courts, as the court below, hold public employers liable for back pay across the board if they maintain a policy that "technically" permits deductions — even where, as in Kern County, no deduction has been made from the pay of the employees who filed suit.

The decision of the Ninth Circuit is consistent with those of some district courts in other circuits. *See, e.g., Banks v. City of North Little Rock* (E.D. Ark. 1988) 708 F. Supp. 1023, 1025 (no showing of actual deductions is needed); *Hawks v. City of Newport News* (E.D. Va. 1988) 707 F. Supp. 212, 215 (if policy for deductions violates FLSA, application to particular group of employees not important); *D'Camera v. District of Columbia* (D.D.C. 1988) 693 F. Supp. 1208, 1212.

The Court of Appeals for the Fourth Circuit heard the same arguments and made a ruling completely opposite from the Ninth Circuit.

In *Hartman v. Arlington County* (4th Cir. 1990) 903 F.2d 290, the Court of Appeals affirmed the decision of the Federal District Court to grant summary judgment in favor of Arlington County, Virginia. The District Court decision is reported at 720 F. Supp 1227 (E.D. Va. 1989). As the Fourth Circuit's Opinion is rather brief, a Memorandum of Law filed by the County of Arlington is reproduced as item "D" in the Appendix.

In the Fourth Circuit case, in contrast with the present case, deductions had actually been made from otherwise exempt personnel for absences of less than one day. In further contrast, Arlington County had reimbursed the employees for those deductions after suit was filed, concurrently with abandoning accountability by hastily enacting a policy of not making deductions after exhaustion of paid leave, retroactive to April 15, 1986. (The date FLSA became applicable to public employers.) The effect of this hasty tactical maneuver is to have a system which strictly accounts for the accumulation and use of time off, but which then, in sham fashion, states that no deductions for absences of less than a day will be made anyway, eviscerating one of the main principles of civil service employee compensation.

The district court in *Hartman* held that under the terms of § 541.118(a)(6) an executive's exempt status would be lost only in those weeks in which unpermitted deductions were made. By making reimbursements, Arlington County had demonstrated compliance with the salary basis test. *Id.*, at 1230. Consequently, the district court concluded "there is no dispute that [fire fighting personnel] are salaried employees." *Id.*

The district court held expressly (720 F. Supp. 1229) that payment of "overtime," in the form of straight time or compensatory time off, did not defeat the exemption, the court citing § 541.118(b) in support. In an extremely short opinion, the Fourth Circuit agreed with the trial court's logic and findings in *Hartman*.

The decision of the Fourth Circuit Court of Appeals is consistent with other federal district court rulings. *See, e.g., International Ass'n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria* (E.D. Va. 1989) 720 F. Supp. 1230, 1232 (unauthorized deductions made from twenty-six employees, but § 541.118(a)(6) provides

"window of correction"); *Harris v. District of Columbia* (D.D.C. 1989) 709 F. Supp. 238, 241 (otherwise exempt employees not "subject to" unauthorized deductions where no deductions had ever been made, despite policy that "technically" allowed for deductions, similar to Kern County's rules). The maneuvering in these decisions produces situations much like *Hartman*, in that public employers are being unjustifiably forced to abandon traditional civil service rules, structure, checks and balances due to the extremely literal application of the Salary Test being made by some courts.

It is clear, from the variety of interpretations and applications of the FLSA's Salary Test being made in different jurisdictions, that coherent national policy is necessary. It is, as stated, a matter of the degree to which this Court will allow Constitutional principles of federalism to be eroded, in the face of a federal interest in protection of workers which is, as to executives in public employment, unnecessary.

II.

Garcia Should be Reconsidered and Limited or Reversed

As above demonstrated, proper application of the principles enunciated in *Garcia* necessitates reversal of the decision below. The "political safeguards" have been foreclosed by the Ninth Circuit's precipitous opinion, in that the terms on which the FLSA will apply to executive and administrative employees have not been fully considered by the Executive or Legislative Branches. The clear intent and mood of Congress, as shown in P.L. 99-150, is to make a very limited application of FLSA to state and local public entities.

Garcia went far beyond its own facts. In the context of wages and hours for transportation workers, a sweeping application of FLSA to all public employment was announced. While there may be a basis for some application of FLSA, a limit based on principles of federalism, common sense and the traditional practices and values of public employment is required. This may be a balancing of the need, if there is any need, for "protection" of higher-income executive public employees as against the needs of local governments to be accountable for their expenditures, and the need to respect local autonomy in light of the federal structure of our national governmental system.

Or perhaps it is time to squarely face the inconsistent patoir that has complicated and burdened public employment since *Garcia*, and to reverse *Garcia* in its entirety. If Congress desires to apply FLSA to state and local governments on some limited basis, Congress should make that decision and define the extent of application to be made. The present situation, judicially imposing an Act intended to control abuses of employees in private industry to governments, has resulted in constant turmoil, uncertainty and inconsistency.

The energies of state and local governments — and not a little tax money — has been diverted by the need to cope with such inconsistency and uncertainty. Reversing *Garcia* and giving the Legislative and Executive Branches the opportunity to define an appropriate application of FLSA to local government will best serve public policy, and the public as a whole.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted. Alternatively, Petitioner requests summary reversal and reinstatement of the trial court's judgment. As a minimum alternative, Petitioner requests the writ issue, ordering reversal and a remand with directions to the Ninth Circuit.

Dated: November 26, 1990.

Respectfully submitted,

B. C. BARMANN,
County Counsel

ROBERT D. WOODS
Chief Deputy - Litigation and
Counsel of Record

Attorneys for Petitioner,
COUNTY OF KERN

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAN ABSHIRE, DENNIS CARROLL, LARRY FRANK, BILL RICKMAN, TOM BLACKMON, RICHARD PELLERIN, BILLIE MCKENZIE, BOB TEMPLE, BARRY SCHULZ, JIM CHAPMAN, BOB TURNER, and STEVE MCLEMORE,
Plaintiffs-Appellants,

v.

COUNTY OF KERN,
Defendant-Appellee.

No. 88-15154
D.C. No. CV-86-0533-EDP
OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Argued and Submitted
June 30, 1989—San Francisco, California

Filed July 11, 1990

Before: Thomas Tang, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Labor

Reversing a judgment of the district court, the court of appeals held that Kern County Battalion Fire Chiefs are not

salaried within the meaning of the Fair Labor Standards Act, 29 U.S.C.§ 541.118(a), and thus are not bona fide executives exempt from the overtime provisions of the FLSA.

Appellants Battalion Chiefs in appellee Kern County Fire Department brought a class action against the County seeking back overtime pay plus interest allegedly due them under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1982), as amended, Publ. Law 99-150 (1985). The FLSA requires employers to provide overtime compensation for hours worked in excess of a prescribed work week. Under the Act, however, bona fide executives are exempt from the FLSA's overtime provisions. At issue in this case was whether the Battalion Chiefs whose pay is subject to deduction for absences of less than a day are paid on a salary basis according to the regulations of the FLSA. The district court ruled that the Battalion Chiefs are bona fide execu... and are therefore not entitled to relief. The Battalion Chiefs appealed.

[1] In order to be considered bona fide executives exempt from the minimum wage provisions of the FLSA, an employee must be paid on a salary rather than on an hourly basis. In order to satisfy the salary test, an employee's pay cannot be subject to deductions for absences of less than a day. [2] There was no dispute in this case that the pay of the Battalion Chiefs is subject to reduction for absences of less than a day. A Battalion Chief who did not have accrued paid or compensatory leave in a given pay period would, under Kern County rules, have his pay docked on an hourly basis for any time he is tardy or absent from work. This scheme of compensation does not comport with the requirements of the FLSA. [3] The court's conclusion that the Battalion Chiefs are not paid on a salary basis was supported by the overtime policy for the Battalion Chiefs, who receive overtime pay or compensatory time off for every tenth of an hour which they work outside of their regularly scheduled hours of duty. [4] The County argued that Battalion Chiefs are salaried even

though their pay is admittedly subject to deductions for part days missed because no such deductions have ever actually been made. The dispositive factor is that under the County's policy, the employee's pay is at all times subject to deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. Battalion Chiefs' pay is contingent. The regulations do not require that a deduction for an absence of less than half a day actually have been made, but only that an employee's pay is subject to such a deduction. The deductions provided for by the County's policy meet the "subject to" standard, and that is all the regulations require.

COUNSEL

Duane W. Reno, David, Reno & Courtney, San Francisco, California, for the plaintiffs-appellants.

B. C. Barmann, County Counsel, Robert D. Woods, Chief Deputy - Litigation, County of Kern, Bakersfield, California, for the defendant-appellee.

OPINION

REINHARDT, Circuit Judge:

At issue in the instant appeal is whether employees whose pay is subject to deduction for absences of less than a day are paid "on a salary basis" according to the regulations implementing the Fair Labor Standards Act. We conclude that they are not, and that therefore such employees are not "bona fide executives" exempt from the protections of the Act.

Appellants, Battalion Chiefs in the Kern County Fire Department ("Department"), brought a class action against

Kern County ("County") seeking back overtime pay plus interest allegedly due them under the overtime provisions of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201, *et. seq.* (1982), as amended, Pub.L. 99-150 (1985). The FLSA requires employers to provide overtime compensation for hours worked in excess of a prescribed work week. 29 U.S.C. § 207. Under the Act, however, "bona fide executives" are exempt from the FLSA's overtime provisions. 29 U.S.C. § 213(a)(1). After a bench trial, the district court ruled that the Battalion Chiefs are "bona fide executives" and are therefore not entitled to relief. The Battalion Chiefs appeal. We reverse.

The administrative regulations promulgated pursuant to the FLSA establish a "duties test" and a "salary test" for determining whether an employee is a "bona fide executive." *See* 29 C.F.R. § 541.1 (a-e) (1988); 29 C.F.R. § 541.1(f)(1988). Generally, in order to claim an exemption, an employer must prove that the employee meets *both* tests. Here, the district court concluded that the Battalion Chiefs met both. In the alternative, the court ruled that the salary test does not apply to the Battalion Chiefs. It based this conclusion on a Department of Labor letter ruling which held that the salary test is inapplicable to persons covered by a state or local law that precludes payment of regular compensation to absent public employees. Because we find that the court erred both in concluding that the appellants met the salary test and in determining in the alternative that the salary test is inapplicable, we need not decide whether appellants satisfy the criteria set out in the duties test.

The essential facts are not in dispute. The County concedes that the Department is an employer subject to the FLSA and has been so since April 15, 1986. The ranks held by employees in the Department, and the number of employees in each rank, are as follows: Chief (1), Deputy Chief (4), Battalion Chief (28), Captain (171), Engineer (193), Firefighter (111), and Heavy Equipment Operator (6). The majority of employ-

ees who perform fire suppression duties are "56-hour fire duty" employees, whose work schedules commence at 8:00 a.m. and conclude at 8:00 a.m. two days later, for a scheduled duration of 48 hours. These employees are scheduled to work 144 hours during each 18-day cycle. Of the 28 Battalion Chiefs: 21 are permanently assigned to particular battalions; three are assigned to provide relief duty for other Battalion Chiefs who are temporarily absent; and one is assigned to each of the following units — Training, Arson, Fire Prevention, and Hazardous Material Control. With the exception of the Battalion Chiefs assigned to Training, Arson, Fire Prevention, and Hazardous Material Control, all of the Battalion Chiefs are "56-hour fire duty" employees. The others are "40-hour safety" employees.

The district court found that Battalion Chiefs are paid an amount expressed and computed as a biweekly salary and that their pay exceeds $250.00 per week. The parties have stipulated that the pay of Battalion Chiefs is subject to a potential deduction for absences from work of less than a day's duration if the absence cannot be "covered" or paid as vacation, sick leave, or accrued compensatory time off. There does not appear to be any evidence that such a deduction has in fact ever been made. The parties have also stipulated that Battalion Chiefs are paid overtime "for each tenth of an hour that they work outside of their regularly scheduled work shifts." However, appellants are only paid their usual hourly rates rather than time and one-half for their attendance at training activities outside of their work shifts, and this is one of the parties' major points of contention. Finally, the County concedes that Department personnel who are not "bona fide executives" and who have work periods of 18 days must be paid at the rate of time and one-half for all hours worked in excess of 136 hours during any such work period.[1] The forty-

[1]The Department "has elected to avail itself" of the provisions of 29 U.S.C. § 207(k), which deals specifically with the calculation of maximum hours for firefighters and police, by declaring an 18-day work week for its fire protection personnel. Subsection 207(k) provides:

hour employees who are not "bona fide executives" must, of course, be paid overtime after forty hours.

The principles governing our review are well established. Exemptions to FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959); Employers who claim that an exemption applies to their employees not only have the burden of proof, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974), but they must show that the employees fit "plainly and unmistakenly within [the exemption's] terms." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Moreover, since a determination of the Battalion Chief's salary status

---

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if —

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

requires an application of the facts to the law, our standard of review is *de novo*. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

[1] As noted above, in order to be considered a "bona fide executive" exempt from the minimum wage provisions of the Fair Labor Standards Act ("FLSA"), an employee must be paid on a salary basis rather than on an hourly basis. In distinguishing these two methods of compensation, the regulations implementing the FLSA provide that:

> An employee will be considered to be paid 'on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, *which amount is not subject to reduction because of variations in the quality or quantity of the work performed.* Subject to the exceptions provided below, *the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.*

29 C.F.R. § 541.118(a) (emphasis added). In order to satisfy the salary test, an employee's pay cannot be *subject to* deductions for absences of less than a day. The Department of Labor has stated that "deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3)." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986. The only court of appeals to have considered this question has also concluded that "[a] salaried professional employee may not be docked pay for fractions of a day of work missed." *Donovan v. Carls Drug Co., Inc.*, 703 F.2nd 650, 652 (2nd Cir. 1983). Subjecting an employee's pay to deductions for absences of less than a day,

including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the . . . quantity of work performed" — especially when hourly increments are at issue.

[2] There is no dispute in this case that the pay of Kern County's Fire Battalion Chiefs is subject to reduction for absences of less than a day. A Battalion Chief who did not have accrued paid or compensatory leave in a given pay period would, under Kern County's rules, have his pay docked on an hourly basis for any time that he is tardy or absent from work. If a Battalion Chief took four hours of vacation or compensatory time off from work during a pay period but had only accrued three hours of vacation or compensatory time, his pay for that period would be reduced by one hour. This scheme of compensation simply does not comport with the requirements of section 541.118(a).

[3] Our conclusion that appellants are not paid on a salary basis is supported by the overtime policy for Battalion Chiefs. Battalion Chiefs receive overtime pay or compensatory time off for every tenth of an hour which they work outside of their regularly scheduled hours of duty. Thus, when a Battalion Chief attends meetings within the fire department or stays past the scheduled end of his shift to continue fighting a fire or to fill out a report, he receives additional compensation. Compensatory time off is provided on an hour-by-hour basis; thus a Battalion Chief who works one hour of overtime will receive one hour of compensatory time off. Such additional compensation for extra hours worked is also not generally consistent with salaried status. *See Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3rd Cir.), *cert. denied sub*

nom. Claridge Hotel and Casino v. McLaughlin, 109 S. Ct. 307 (1988); *Banks v. City of North Little Rock*, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988).[2]

[4] The County argues that Battalion Chiefs are "salaried" even though their pay is admittedly subject to deductions for part days missed because no such deductions have ever actually been made. That fact, however, is both misleading and irrelevant. That Battalion Chiefs will generally accrue sufficient compensatory or leave time to avoid an actual reduction in their take-home pay does not change the fact that deductions from pay based on hourly attendance are explicitly provided for under the County's policy. The policy provides, in effect, that the deductions shall be made first from accrued compensatory or leave time and then from the employee's base pay. However, whether the employee's base pay is the first or second source for recoupment of monies paid for hours missed is of no significance for purposes of section 541.118(a). The dispositive factor is that under the County's policy, the employee's pay is at all times "*subject to*" deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. Battalion Chiefs' pay is contingent. Section 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an

[2]Although the salary status of Deputy Chiefs and the Fire Chief is not at issue in this case, the emphasis on hours worked for Battalion Chiefs is even more apparent when the treatment of Battalion Chiefs is contrasted with the treatment of Deputy Chiefs (and the Fire Chief). Deputy Chiefs are not required to report absences of a short duration and thus will not have such absences charged against accrued leave time or deducted from their salary. Similarly, their salary is *not* subject to deduction for tardiness. Nor do Deputy Chiefs receive overtime pay or even compensatory time off for hours worked beyond their normal work hours. Thus, if a Deputy Chief worked beyond his regularly scheduled hours to fill out a report, he would not receive extra time off. Only under special circumstances might he receive compensatory time — for example, if a large fire required his presence outside of his normal work hours; even in such an instance, however, the compensatory time would be measured loosely, not balanced hour-by-hour.

employee's pay be "*subject to*" such a deduction.[3] That, it clearly is. In short, the deductions provided for by the County's policy meet the "subject to" standard and that is all that the regulations require.[4]

The County also argues that a January 15, 1986 Wage and Hour Division Letter Ruling supports its position that the Battalion Chiefs are "salaried" employees. A paragraph near the end of the letter ruling states:

> Where an occasional deduction that is not permitted

---

[3]In fact, a strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as "salaried." However, we need not decide that question here.

[4]Although no circuit courts have yet faced the question, a majority of district courts that have addressed it have held that employees whose pay is "subject to reduction" for such absences are not salaried, even if no deductions have actually been made. *See, Banks*, 708 F. Supp. at 1025 (no showing of actual deductions is needed); *Hawks v. City of Newport News, Virginia*, 707 F. Supp. 212, 215 (E.D. Va. 1988) ("[I]t is the defendant's policy which is under attack in a suit brought under the FLSA. The fact that the policy has not been applied to a particular group of employees does not alter the policy itself."); *Persons v. City of Gresham, Oregon*, 704 F. Supp. 191, 194 (D. Or. 1988) (that employees did not allege any instance in which county had reduced pay of employee who had no accrued leave for an absence of less than a day did not alter the fact that their pay was "subject to" such deductions); *D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1988) ("[T]he test under 29 C.F.R. § 541.118(a) is whether a sergeant's paycheck is 'subject to reduction,' not the frequency with which a sergeant's pay is so reduced."); *Knecht v. City of Redwood*, 683 F. Supp. 1307 (N.D. Cal. 1987) ("That no Fire Captain has actually had his pay reduced as a result of a short-term absence since April 15, 1986 does not alter the undisputed fact that Fire Captains' pay checks are 'subject to reduction' for such absences."); *but see Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (declining "plaintiffs' invitation to declare them eligible for overtime compensation at this stage of the proceeding" because, since no unauthorized deduction has actually been made, the court is unable to analyze the facts and circumstances surrounding such a deduction).

> is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid 'on a salary basis' and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

The County interprets this letter ruling as saying that whether or not employees' base pay is subject to deductions, the employees only lose their salary status for the specific weeks in which an employer actually makes a deduction not permitted by section 541.118(a). The letter ruling responded to a request by certain counties for an opinion as to whether they were compensating their employees on "a salary basis." The counties had a policy of reducing employees' pay for absences due to illness of less than a day but only when an employee had already exhausted all earned sick leave. Thus the policy presented precisely the same legal question as does the policy before us. The counties requesting the letter ruling asked specifically whether the deductions provided for in their policies could be made under the Department's regulations. The Deputy Administrator responded that they could not, and that an employee whose pay was reduced pursuant to those policies would not meet the criteria for a salaried employee exempt from the FLSA provisions. At the end of the letter ruling, after answering the counties' question in the negative, the Deputy Administrator added the ambiguous paragraph on which the County relies.

Although the Deputy Administrator's statement that an occasional unpermitted deduction would not change an individual's overall salary status appears at first glance to provide some support for the County's view, the statement would make little sense if deemed applicable to an employer's general policy providing for unpermitted deductions as a matter of course. The purpose of the statement was quite to the con-

trary. It was to ensure that an employer is not permanently penalyzed for an inadvertent or unintentional deduction. Where there is an occasional deduction made because of an error on the part of a government entity or because of an individual decision by a supervisor, there is good reason to say that the affected employee's status will be changed only for the week in which the unpermitted deduction was made. *Cf.* § 541.118(a)(6) (where individual error made and corrected). But where an employer deliberately adopts a policy rendering employees' pay "*subject to*" deductions for unpermitted reasons, the frequency with which an employer is forced to apply that policy is irrelevant. If there is any cause to determine the frequency with which an employer makes unpermitted deductions, it is only to help in determining whether such a policy exists (causing the Department to "question whether the employee is actually paid 'on a salary basis' "). Here there is no question that the County's policy provides for such deductions.

To read the letter ruling differently would be to write the "subject to" language out of the Department's regulations. It is unlikely that the Deputy Administrator in a casual paragraph added after completing his answer to the counties' question — a paragraph that does not even mention the "subject to" provision — intended to make so drastic a change in the regulations. Nor, even if that were the Deputy Administrator's intention, could he have effectively done so, for an Administrator's letter ruling cannot override the express provisions of a Department of Labor regulation.

For similar reasons, we reject any suggestion that subsection (6) of section 541.118(a) is applicable to the present case. The complete text of subsection 541.118(a)(6) provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available,

> it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Once again, the thrust behind the regulations is to facilitate the determination whether an employer has a general *policy* of deducting for absences of less than a day or whether a deduction is made as a result of inadvertence or error. The exception in subsection (6) is for an employer that makes a one-time improper deduction and then corrects its error. This provision is of no relevance in the case of an employer that, like the County of Kern, has adopted an express policy of deducting for part-day absences when an employee has no accrued leave, and has continued to adhere to such a policy.

Finally, the County argues that even if appellants cannot be considered "salaried" under the regulations, the salary test is inapplicable to the Kern County Battalion Chiefs in light of Article XVI, section 6 of the California Constitution. In a January 9, 1987 Letter Ruling, the Wage and Hour Division announced that it would not apply the salary test to public employees "where the public employer can show that a provision contained in the applicable state or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) . . . which are not covered by available paid leave." The County contends that Article XVI, section 6, is such a provision. In ruling in the alternative that the salary test does not apply to the Battalion Chiefs, the district court apparently accepted this argument. It erred in doing so.

Article XVI, section 6 of the California Constitution provides that the Legislature shall not "have power to make any

gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." There is neither any authority nor any logic to support a holding that a general constitutional provision like Article XVI, section 6, which on its face simply bars gifts of public funds, constitutes a requirement that a deduction be made from the compensation of any salaried public employee who takes an hour or so off from work. With the exception of the district court below, no court, state or federal, in the long history of Article XVI and its predecessors has drawn the conclusion that the California Constitution's prohibition against gifts of public funds mandates the reduction of state employees' pay for absences from work.

The unique suggestion that the California Constitution precludes the state from paying any state employee, including the Governor, a full salary without making deductions for an extra long lunch hour or time off during work to get a haircut, is simply untenable. In fact, the California Constitution's prohibition against gifts of public funds is designed to ensure that public monies are expended for public, rather than private, purposes. Numerous California cases interpreting this provision have held that, where money is spent for a public purpose, "the appropriation is not a gift even though private persons are benefited by the expenditure." *Los Angeles County v. Fuentes*, 20 Cal. 2d 870, 877, 129 P.2d 378, 382 (1942), *cert. denied*, 317 U.S. 698 (1943). In the case before us, not only is the purpose public, but also the benefited employees. California courts have repeatedly recognized that the payment of salaries and employment benefits to government employees in order to remain competitive in the labor market with private companies constitutes a legitimate public purpose. *See, e.g., San Joaquin County Employee's Association, Inc. v. County of San Joaquin*, 39 Cal. App. 3d 83, 86, 113 Cal. Rptr. 912, 914 (1974); *Jarvis v. Cory*, 28 Cal. 3d 562, 578 n.10, 620 P.2d 598, 607 n.10 (1980) (*en banc*). Nothing in private or public employment law suggests that a "bona fide executive" must punch a time clock, nor that he must suf-

fer a pay-deduction if he is late for work or occasionally uses a small portion of his time to take care of personal necessities, and we see no reason to construe Article XVI, section 6 of the California Constitution as proclaiming so odd a policy. The January 1987 letter ruling is therefore not a reason to hold that the salary test does not apply to the Kern County Battalion Chiefs.

For the above reasons, we hold that the appellants are not "salaried" within the meaning of section 541.118(a) and thus are not "bona fide executives" exempt from the provisions of the FLSA.

REVERSED AND REMANDED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAN ABSHIRE, DENNIS CARROLL,
LARRY FRANK, BILL RICKMAN,
TOM BLACKMON, RICHARD PELLERIN,
BILLIE McKENZIE, BOB TEMPLE,
BARRY SCHULTZ, JIM CHAPMAN,
BOB TURNER, and STEVE McLEMORE,
Plaintiffs-Appellants,

v.

COUNTY OF KERN,
Defendant-Appellee

No. 88-15154
D.C. No. CV-86-0533-EDP
ORDER

Before: TANG, REINHARDT and WIGGINS,
Circuit Judges

Appellee's petition for rehearing is DENIED.

APPENDIX C

B. C. BARMAN, COUNTY COUNSEL
COUNTY OF KERN, STATE OF CALIFORNIA
By Robert D. Woods, Chief Deputy-Litigation
Administration and Courts Building
1415 Truxtun Avenue, Fifth Floor
Bakersfield, California 93301
Telephone: (805) 861-2326

Attorney for COUNTY OF KERN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAN ABSHIRE, et al.,
Plaintiff,
vs.
THE COUNTY OF KERN,
Defendants.

NO. CV-F 86-533 MDC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The captioned matter came on regularly for trial before the Honorable Myron D. Crocker, United States District Judge, commencing May 3, 1988. Appearances

by Duane N. Reno, Esq. of Davis, Reno & Courtney, San Francisco, Ca. for the Plaintiffs, and Robert D. Woods, Esq., Chief Deputy County Counsel-Litigation, Bakersfield, Ca. on behalf of Defendant County of Kern. The case proceeded without jury.

Having heard and considered the oral and documentary evidence, the arguments of Counsel and pertinent laws, the following was established to the Court's satisfaction.

1.

FINDINGS OF FACT

1. The primary duty of Battalion Chiefs in the Kern County Fire Department ("KCFD") is management of a customarily recognized subdivision of the KCFD, to wit a fire battalion.

2. Battalion Chiefs regularly and routinely supervise, direct and review the work of more than two other KCFD employees.

3. Battalion Chiefs perform evaluations of their subsidiary Fire Captains, and review, approve and comment upon evaluations of Fire Fighters and Engineers made by their subsidiary Fire Captains. The KCFD and the County of Kern give weight to and rely upon these evaluations in hiring, firing, promoting and adjusting the pay of Fire Fighters, Engineers and Fire Captains.

4. Battalion Chiefs have authority and discretion, subject to reasonable limitations and standards contained in KCFD manuals which are binding on all KCFD personnel, to assign personnel and equipment of their Battalions to particular locations and uses, and have further authority and discretion to direct, correct and

alter the methods of work employed, and authority to temporarily suspend subordinates from work subject to limitations contained in the Kern County Civil Service Rules.

5. Battalion Chiefs spend less than twenty percent (20%) of their time (excluding on-duty sleeping hours) performing tasks unrelated to, or only marginally related to their managerial and executive functions within their respective Battalions.

6. Battalion Chiefs are paid an amount expressed and computed as a bi-weekly salary. The salary is subject to deductions for unauthorized absences from work by reason of the California Constitution, Article XVI, Section 6 which proscribes a gift of public funds. The County of Kern has adopted implementing Ordinances and Civil Service Rules as required by the State Constitution which prevent making a gift of public funds.

7. As to possible deductions for unauthorized absences, Battalion Chiefs are treated no differently than any other Civil Service employee of the County of Kern, including Department heads and categorically FLSA exempt (29 CFR 541.302) employees such as doctors and lawyers.

8. The salary paid to Battalion Chiefs exceeds $250.00 per week and is paid for their management of customarily recognized subdivisions of the KCFD, to wit fire battalions.

CONCLUSIONS OF LAW

1. Battalion Chiefs within the KCFD are bona fide executive employees in accordance with the "Duties Test" contained in the Fair Labor Standards Act at 29 CFR sec. 541.1(a) through (e), inclusive.

2. Battalion Chiefs within the KCFD are paid a salary within the meaning of the "Salary Test" contained in the Fair Labor Standards Act at 29 CFR sec. 541.1(f).

Alternatively, the "Salary Test" is inapplicable to government employers who are statutorily precluded from paying other than for goods and services received, as expressed in the Department of Labor's Letter Ruling dated January 29, 1986.

3. Battalion Chiefs within the KCFD are exempt from the coverage of the Fair Labor Standards Act as being employed in a bona fide executive capacity, in accordance with section 213(a)(1) of the Fair Labor Standards Act, 29 USC sec. 201 et seq.

DATED: May 31st 1988

/s/ M. D. Crocker
Myron D. Crocker
U. S. District Court Judge

B.C. BARMANN, COUNTY COUNSEL
COUNTY OF KERN, STATE OF CALIFORNIA
By Robert D. Woods
Chief Deputy - Litigation
Administration and Courts Building
1415 Truxtun Avenue, Fifth Floor
Bakersfield, California 93301
Telephone: (805) 861-2326

Attorneys for Defendant,
COUNTY OF KERN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAN ABSHIRE, et al.,
Plaintiffs,
vs.
THE COUNTY OF KERN,
Defendants.

NO. CV-F 86-533 MDC
JUDGMENT

This matter came on regularly for trial commencing May 3, 1988, the Honorable Myron D. Crocker, United

States District Judge, presiding, and the issues having been duly tried and a decision rendered.

IT IS ORDERED AND ADJUDGED defendant, COUNTY OF KERN, have judgment in its favor, that Battalion Chiefs employed by the Kern County Fire Department are Bona Fide Executive Employees within the meaning of the Fair Labor Standards Act, and are therefore exempt from coverage of said Act, and that defendant, COUNTY OF KERN, recover its costs in this action from plaintiffs.

Dated at Fresno, California, this ___ day of July 1988.

Clerk of the U.S. District Court

IT IS SO ORDERED
DATED JUL 18 1988

/s/ M. D. Crocker
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WILLIAM HARTMAN, *et al.*,
Plaintiffs,
v.
ARLINGTON COUNTY, VIRGINIA,
Defendant.

No. 88-1418-A

ARLINGTON COUNTY'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff's response to the Motion for Summary Judgment demonstrates that plaintiffs cannot dispute the following material facts supporting the County's motion:

1) The salary range for Fire Shift Commanders in Arlington County is $37,691.68 to $53,162.72, well in excess of the $250.00 per week salary standard required by the Department of Labor's "short test" for exempt executive employees;

2) the Shift Commander's salary is the same for any 28-day work period whether the Fire Shift Commander works 216 hours or 240 hours;

3) the Fire Shift Commander regularly receives a predetermined salary, "constituting all or part of his compensation, which amount is not subject to reduction

because of variations in the quality or quantity of the work performed" within the meaning of 29 C.F.R. § 541.118(a);

4) the additional compensation Fire Shift Commanders receive for hours worked beyond their regular shift does not detract from the "salary basis" of their compensation since 29 C.F.R. § 541.118(a) and (b) provide that "the salary may consist of a predetermined amount *constituting all or part of the employee's compensation* [and] "*additional compensation besides the salary is not inconsistent* with the *salary basis of payment.*" 29 C.F.R. § 541.118(b);

5) the additional compensation Fire Shift Commanders receive for work beyond their regular shift is paid irrespective of the number of hours the Shift Commander actually works during the two-week period;

6) since April 15, 1986, no exempt employee in the Arlington County Fire Department has had any reduction in pay for absences of less than one full work day and that no plaintiff has had a reduction in pay for absences of less than one full work day;

7) written County policy regarding disability, sick leave, jury duty, and deductions from salaries of exempt County employees are consistent with a salary basis of compensation defined in 29 C.F.R. § 541.118;

8) the compensation of exempt employees of Arlington County is not subject to any reductions that would violate the salary

basis as defined in § 541.118 and the few inadvertent reductions inconsistent with § 541.118 that have occurred since April 15, 1986 were outside the Fire Department and have been remedied by the County;

9) the undisputed facts set forth in the Shift Commander's written responses to the County's Job Information Questionnaire, reveal that

   a) A Shift Commander's job is to "supervise an engine company" in order to deliver "efficient and effective fire and rescue services within my company's response area." Exhibit 5, page 2, A and B.

   b) A Shift Commander's "major duties" performed "on a regular basis", are

Daily Duties — Work Performed Every or Almost Every Workday	Approx. No. of Hours Performed per day
Supervise fire and rescue emergency incidents along with non-emergency incidents ie. lock outs, broken water pipes.	5 hrs.
Administrative duties including record keeping, filing, report writing, ordering supplies, contacting outside agencies etc.	2-3 hrs.

Provide training for my company on a daily basis and for other companies (medic, other jurisdictions, county agencies) weekly.	3 hrs.
Supervise daily shift meeting-assign tasks, update information.	1 hr.
Assist citizens entering the fire station for directions and giving BP checks, Charity food kits, public safety information.	1 hr.
Supervise physical training, ie. running, weight training and aerobics. Manage team building and related shift activities.	2 hrs.

Exhibit 5, page 2, 2A.

c) Fire Shift Commanders "supervise . . . 4 to 9 employees". Exhibit 5, page 9, 8B and Exhibit 6, page 9, 8B.

d) the undisputed facts set forth in Exhibits 5, 6, 7 and 8 contain repeated examples demonstrating that plaintiffs' primary duty is the management of their Fire Stations.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202 (1986), the United States Supreme Court stressed that not every dispute of fact requires a trial and resolved any ambiguities in Rule 56 in favor of more frequent use of summary judgment:

> [T]he mere existence of *some* alleged factual disputes between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* facts.

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . .
>
> [As to genuineness] there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

91 L.Ed.2d at 211, 212 (citations omitted).

The Court observed that ruling on a summary judgment motion necessarily involves application of the substantive evidentiary standards of proof that would apply at the trial on the merits. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 214. The Fourth Circuit has held that such evidence must rise to a level of probability, rather than a mere possibility. *Foster v. Tandy Corp.*, 828 F.2d 1052, 1056 (4th Cir. 1987); *Lovelace v. Sherwin Williams Co.*, 681 F.2d 230, 245 (4th Cir. 1982).

In *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-65 (4th Cir. 1985), the Fourth Circuit stated:

> [W]hen a motion for summary judgment is made and supported as provided in Rule 56, a non-moving party must produce "specific facts showing that there is a genuine issue for trial,"

> rather than resting upon the bald assertions of his pleadings. Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes.

Id. at 364-65.

In *Harkins v. City of Chesapeake*, No. 88-254-N (E.D. Va. Dec. 2, 1988) and *Chadwick v. City of Norfolk*, No. 88-254-N (E.D. Va. Dec. 19, 1988) (attached) the Court ruled that inadvertent deductions did not destroy the "salary basis" of compensation received by fire captains.

If a few inadvertent deductions in pay from non-Fire Department employees could destroy the executive exemption, then Arlington County would have no exempt employees at all, from the County Manager on down. This absurd result clearly conflicts with 29 C.F.R. § 541.118. The Department of Labor will not even enforce the Regulations at issue against public employees. See Wage & Hour Memoranda of January 9, 1987 and Opinion Letter of July 17, 1987.

Plaintiffs' conclusory assertions about their compensation and job duties do not dispute the hard facts in this record:

> To resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute. His bare contention that the issue is disputable will not suffice.

White v. Boyle, 538 F.2d 1077, 1079 (4th Cir. 1976), *quoting Zoby v. American Fidelity Company*, 242 F.2d

76, 80 (4th Cir. 1957). *See also Johnson v. McKee Baking Company,* 398 F. Supp. 201, 206 (W.D. Va. 1975) ("General allegations, therefore, will not prevent the award of summary judgment.")

In *First National Bank of Arizona v. Cities Service Company,* 391 U.S. 253 (1968), the United States Supreme Court of the United States discussed the requirements for avoiding the imposition of summary judgment under Rule 56(e):

> To the extent that ... Rule 56(e) should ... be read [to] ... permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files [a] ... complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. at 289-90. *See also United States v. Potamkin Cadillas Corp.,* 689 F.2d 379, 381 (2nd Cir. 1982) ("To defeat a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Such an issue is not created by a mere allegation in the pleadings nor by surmise or conjecture on the part of the litigants.").

Similarly in *Hahn v. Sargent,* 523 F.2d 461 (1st Cir. 1975), the First Circuit held that:

> To be considered "genuine" for Rule 56 purposes, a material issue must be established by "sufficient evidence supporting the claimed factual dispute" to require a judge or a jury to resolve the parties' differing versions of the truth at trial. The evidence manifesting the dispute must be "substantial," going beyond the allegations of the complaint.

Id. at 464 (citations omitted).

In *Harkins v. City of Chesapeake, supra* and *Chadwick v. City of Norfolk, supra,* Judge Clarke carefully set forth the legal principles against which plaintiffs' job duties must be measured. When those principles are applied to the undisputed material facts of this case, it is clear that Arlington County is entitled to summary judgment.

Respectfully submitted,

ARLINGTON COUNTY, VIRGINIA

By: /s/ James P. McElligott
Of Counsel

James P. McElligott, Jr.
Scott S. Cairns
McGUIRE, WOODS, BATTLE & BOOTHE
One James Center
Richmond, Virginia 23219
(804) 644-4131

Peter H. Maier
County Attorney
County of Arlington, Virginia
#1 Courthouse Plaza, Suite 403
2100 Clarendon Boulevard
Arlington, Virginia 22201
(703) 358-3097

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Arlington County's Reply Memorandum in Support of Motion For Summary Judgment has been mailed, postage prepaid, to Thomas A. Woodley, Esquire and Gregory K. McGillivary, Esquire, MULHOLLAND & HICKEY, 1125 15th Street, N.W., Suite 400, Washington, D.C. 20005; Quentin R. Corrie, Esquire and Walter S. Boone, III, Esquire, ANDERSON, QUINN & WYLAND, 8111 Gatehouse Road, Suite 409, Falls Church, Virginia 22047, counsel for plaintiffs, this 12th day of April, 1989.

/s/ James P. McElligott